

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>95-10342</u>
LISA L. CLARKE)	
)	
Debtor)	
_____)	
AMERICAN INVESTMENT BANK, N.A.)	FILED
)	at 3 O'clock & 50 min. P.M.
Plaintiff)	Date: 1-19-96
)	
vs.)	Adversary Proceeding
)	Number <u>95-01053A</u>
LISA L. CLARKE)	
)	
Defendant)	
)	

ORDER

American Investment Bank, N.A. ("AIB") seeks a determination of nondischargeability under 11 U.S.C. §523(a)(2) of an unsecured debt incurred by the debtor, Lisa L. Clarke. AIB alleges that Ms. Clarke procured a loan through the fraudulent use of the signature of Charles C. Clarke III, Ms. Clarke's former husband, and a misstatement of the debtor's financial position. For the reasons that follow, the debt is excepted from discharge in the debtor's Chapter 7 case.

In December of 1993, Ms. Clarke received an unsolicited, pre-approved credit application from AIB for funds up to \$50,000.

Ms. Clarke applied for a \$60,000.00 loan from AIB for the stated purpose of paying taxes and general unsecured debts. The AIB application required that Ms. Clarke specify the combined income and assets of her husband and herself. Ms. Clarke completed the application with the requested information, but understated her gross annual income by approximately \$51,000.00. Before returning the application via facsimile, Ms. Clarke signed both her name as the "applicant" and Mr. Clarke's name as "co-applicant." After a telephone interview verifying the pertinent information on the short form loan request, AIB forwarded to Ms. Clarke a promissory note, insurance application, and loan data verification form. AIB also requested a photocopy of both Mr. and Ms. Clarke's driver's licenses for identification purposes. Ms. Clarke again signed both her name and Mr. Clarke's name to the documents dating her signature 12-29-93 and her husband's "signature" 12-30-93. She then forwarded these documents, along with the photocopies of their driver's licenses, to AIB. Ms. Clarke signed her husband's name to the documents to resemble his actual signature appearing on his driver's license.

On January 3, 1994 AIB issued a check for \$17,000 payable to Mr. and Ms. Clarke jointly. Ms. Clarke endorsed both of their names on the check and deposited the funds into their joint bank account. The loan subsequently became delinquent without any payment of principal. In an attempt to collect payments on the note, Ms. Mary Bernard, AIB Vice President of collections, called Ms. Clarke on July 19, 1994 to discuss the past due amount. During

this conversation, Ms. Clarke disclosed to Ms. Bernard that the signatures appearing on the loan documents were not that of Mr. Clarke. Ms. Clarke also stated that at the time the documents were signed she held a general power of attorney which authorized her to sign Mr. Clarke's name to the documents. The loan documents contain no indication that Mr. Clarke's name was being signed by an authorized agent in a representative capacity. No power of attorney was offered at trial.

Pursuant to Ms. Clarke's request during this telephone conversation, AIB prepared and mailed to Ms. Clarke a loan modification agreement. This modification was executed on July 26, 1994, and extended repayment of the loan to January 27, 1994.¹ AIB did not require Mr. Clarke to sign the modification, nor did AIB attempt to contact Mr. Clarke or have him ratify the initial loan agreement. Ms. Clarke filed her case under Chapter 7 of the Bankruptcy Code on March 6, 1995, listing AIB as an unsecured creditor. AIB filed a proof of claim showing an unsecured debt of \$18,800.34 as of March 16, 1995. The debt as of the date of the trial September 28, 1995 had increased to \$20,188.05 and continued accruing interest at the rate of \$8.42 per day.

Ms. Clarke's testimony and the deposition of Mr. Clarke admitted into evidence disclosed that throughout their marriage both prior and subsequent to the AIB loan, Ms. Clarke regularly managed the couples' financial paperwork. Ms. Clarke had borrowed money and

¹The date was intended to be January 27, 1995.

obtained credit by signing her name and her husband's name to loan and credit applications. In 1992, Mr. Clarke executed a power of attorney in favor of Ms. Clarke to enable her to close the purchase of their home in both of their names. However, the document was not produced at trial and the scope or duration of the power of attorney was not established. Although the debtor insists that the document was a general power of attorney authorizing her to borrow money on Mr. Clarke's behalf and that it was in force when this loan was executed, Mr. Clarke deposed that the power of attorney was only for the purchase of their home. On at least one instance, Ms. Clarke executed a loan on behalf of her husband by signing his name "by LLC POA". On at least three occasions, Ms. Clarke incurred joint debt by executing loan applications in her name and Mr. Clarke's name by signing his name without identifying her agency capacity. Mr. Clarke expressly authorized these transactions prior to their consummation. Mr. Clarke testified that he did not give Ms. Clarke authorization to incur the AIB debt.

The Court has jurisdiction to hear this matter as a core bankruptcy proceeding under 28 U.S.C. §157(b)(2)(I).

AIB seeks a determination that the debt incurred by Ms. Clarke is nondischargeable under 11 U.S.C. §523(a)(2)(A & B)².

²
follows: 11 U.S.C. §523(a)(2) reads in material part as
(a) A discharge under section 727,
1141, 1228(a), 1228(b), or 1328(b) of
this title does not discharge an
individual debtor from any debt—

Exceptions to discharge are to be construed strictly and the burden rests with the creditor to prove each element justifying the exception. Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986) (citations omitted); Household Fin. Corp. v. Richmond (In re Richmond), 29 B.R. 555 (Bankr. M.D. Fla. 1983). The creditor's burden of proof is by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Denial of Dischargeability under 11 U.S.C. §523(a)(2)(A)

. . .

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

In order to preclude the discharge of a particular debt under §523(a)(2)(A), a creditor must prove that:

- (1) the debtor made a false representation with the intent of deceiving the creditor;
- (2) the creditor relied upon such representation;
- (3) the reliance was justifiable; and
- (4) the creditor sustained a loss as a result of the representation.

Field v. Mans, ___ U.S. ___, 116 S.Ct. 437, ___ L.Ed.2d ___ (1995).

This case turns on a determination of a false representation with an intent to deceive. The evidence clearly establishes elements two through four. The uncontroverted testimony established that AIB would not have extended credit without the obligation of both Clarkes and relied upon the signature of Mr. Clarke to extend the loan. Reliance on what appeared to be Mr. Clarke's signature was justified based upon comparison of the signatures on the driver's license and loan documents, the apparent disparity of handwriting between the two borrowers and different dates indicated for signature of the borrowers. AIB suffered a loss of the loan amount because of this debtor's bankruptcy and inability to collect from the co-borrower.

Ms. Clarke established that AIB entered into a loan modification and required only her signature after learning that she signed her husband's name to the original loan document. This evidence was ostensibly introduced to rebut AIB's assertion of justifiable reliance. However, "[t]he reasonableness of [a

creditor's] conduct after turning over his money is ... irrelevant to the reasonableness of his reliance on the representation which induced the loan in the first place." Collins v. Palm Beach Sav. & Loan (In re Collins), 946 F.2d 815, 817 (11th Cir. 1991), quoting Carini v. Matera, 592 F.2d 378, 381 (7th Cir. 1979). See also, In Re Kim, 125 B.R. 594 (Bankr. C.D. Cal. 1991) (Debtor's obligation to lender was nondischargeable on fraud grounds, even though lender, after learning of fraud, entered into loan modification or forbearance agreement with borrowers.)

Ms. Clarke argues that AIB did not establish the first element, claiming that she signed the document for her husband in a representative capacity. Establishing an intent to deceive is the most difficult element under §523(a)(2)(A). Absent an admission of bad intent, the creditor must prove intent by inference based upon the facts and circumstances of the case. See In re Miller, 39 F.3d 301, 305 (11th Cir. 1994). In this case it is undisputed that Ms. Clarke signed her former husband's name to the loan documents without identifying her alleged representative capacity. This raises two issues: whether the representation of her husband's signature was false, and if so, whether she made the misrepresentation with an intent to deceive AIB.

Ms. Clarke asserts that the representation of her husband's signature was not a false representation because she was authorized by a general power of attorney to sign his name and bind him to the debt. Alternatively, Ms. Clarke urges that general state

law agency principles establish her authority to bind her husband. He being obligated on the original note, there was no misrepresentation nor then could there have been an attempt to deceive.

A. Choice of Law.

Determining the existence of fraud in an action under §523(a)(2)(A) is a matter of federal, not state law. Grogan v. Garner, 111 S. Ct. at 658; Rishell v. Davis (In re Davis), 115 B.R. 346, 349 (Bankr. N.D. Fla. 1990). However, as to whether Ms. Clarke was authorized to sign the loan documents as an agent of Mr. Clarke, state law controls. Initially I must establish which state's law applies to determine whether Ms. Clarke had authority to sign her husband's name and bind him to the AIB debt. The conflict of laws provision of Georgia applies. United Counties Trust Co. v. Mac Lum, Inc., 643 F.2d 1140 (5th Cir. 1981) (A federal court should apply the choice of law provision of the state in which the court sits.) At all times relevant to this inquiry, the debtor was and is a resident of Georgia. It is undisputed that she received a solicitation for this loan and executed the loan application in Georgia. However, AIB is a national bank located in Salt Lake City, Utah. Furthermore, the loan agreement executed by Ms. Clarke clearly reads "[t]his loan shall be governed by, and construed in accordance with the laws of the state of Utah." The loan modification drafted by AIB also contains an identical choice of law

provision. Under Georgia law, "... when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such state or nation shall govern their rights and duties." Official Code of Georgia Annotated (O.C.G.A.) §11-1-105. Because the transaction bears a reasonable relation to the State of Utah, the contract's choice of law provision controls. Utah substantive law applies.

B. Agency authority under Utah law.

Under Utah law, an agent may execute a note on behalf of a principal by signing the principal's name to the note without disclosing the agency capacity on the face of the instrument. Utah Code Anno. (U.C.A.) §§ 25-5-9, 70A-3-403.³ Because Utah law allows an agent to bind her principal by signing the principal's name without disclosing the agency to the third party, the issue becomes whether Ms. Clarke was an agent of her husband authorized to incur debt on his behalf without his knowledge or express consent.

In an action on a note, the "authority to make each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the

³§25-5-9 provides that "Every instrument...to be subscribed by any party may be subscribed by the lawful agent of such party.

§70A-3-402 provides that "If a person acting ... as a representative signs an instrument by signing ... the name of the represented person ... the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract."

pleadings, the burden of establishing validity is on the person claiming validity..." U.C.A. §70A-3-308. Although Ms. Clarke argues that the signature of her husband is valid under a power of attorney executed in her favor, she has not produced sufficient evidence to establish the existence of the power of attorney or the scope of authority granted by the document. The only evidence regarding the power of attorney consisted of Ms. Clarke's testimony claiming its existence and Mr. Clarke's deposition testimony in which he vaguely acknowledged executing a power of attorney at some time in the past to allow Ms. Clarke to close a real estate transaction in his absence. Although Mr. Clarke never revoked that power of attorney, there is no evidence regarding the duration or scope of authority granted by that document. Therefore, I find that at the time of the loan, Ms. Clarke was not authorized to act as an agent of her husband under any power of attorney.

Without a formally executed power of attorney authorizing Ms. Clarke to borrow money in her husband's name, Ms. Clarke must rely upon general principles of agency to determine whether her husband's signature is valid under Utah law. "A husband or wife can be authorized to act for the other party to the marital relation." Restatement 2d Agency §22.

Neither husband nor wife by virtue of the relation has power to act as agent for the other. The relation is of such a nature, however, that circumstances which in the case of strangers would not indicate the creation of authority or apparent authority may indicate it in the case of husband and wife. Thus, a husband habitually permitted by his wife to

attend to some of her business matters may be found to have authority to transact all her business affairs.

Restatement 2d Agency §22 comment b.

An agency relationship does not have to arise by a formal writing. Rather, the agency relation results from "...the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement 2d Agency §1. Utah case law has adopted this approach.

The actual authority of an agent may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question. Implied authority embraces authority to do whatever acts are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent.

Bowen v. Olsen, 576 P.2d 862, 863 (S.Ct. Utah 1978), citing 3 Am. Jur.2d, Agency, §71; See also Zions 1st Nat.'l Bank v. Clark Clinic Corp., 762 P.2d 1090 (S. Ct. Utah 1988) (adopting Restatement approach to implied authority). Utah law allows the establishment of an agency relationship based upon "all the facts and circumstances" of a particular case without requiring a formal writing evidencing the existence and scope of the agency.⁴ Vina v. Jefferson Ins. Co., 761 P.2d 581, 585 (Utah App. 1988).

⁴U.C.A. §25-5-4 requires that "every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation..." to satisfy the statute of frauds. No other code section requires a writing to create an agency relationship in any other context.

Ms. Clarke did not execute the AIB loan documents as an agent of Mr. Clarke. Mr. Clarke's deposition testimony provides the most compelling support for this conclusion. Mr. Clarke had no knowledge of the AIB loan, and therefore could not consent to the execution of the loan in his name either tacitly or explicitly. Furthermore, the fact that Ms. Clarke had previously incurred joint debt by signing her husband's name to applications with his full knowledge and consent is insufficient to establish that Ms. Clarke had authority to incur debt in Mr. Clarke's name without his knowledge or consent. Ms. Clarke did not have implied authority to bind Mr. Clarke under the note, and her signing Mr. Clarke's name to the note constituted a material misrepresentation under §523(a)(2)(A).

The facts of this case establish that Ms. Clarke made this misrepresentation with the intent to deceive AIB. As discussed above, Ms. Clarke deliberately changed her writing style when signing her husband's name to mimic his real signature disclosed on his driver's license and dated the signatures differently. Only one reasonable inference can be drawn from the evidence: Ms. Clarke signed the documents in a manner which would not and did not cause AIB to question the authenticity of the signature, and that she intended to deceive AIB by her actions. See, FDIC v. Cerar (In re Cerar), 84 B.R. 524 (Bankr. C.D. Ill. 1988) (debt nondischargeable under §523(a)(2)(A) when debtor signed son's signature on loan document); Security Pac. Fin. Corp. v. Grove (In re Grove), 73 B.R.

590 (Bankr. D. Minn. 1987) (debt nondischargeable under §523(a)(2)(A) when debtor signed wife's signature on promissory note); Hutchinson Nat.'l Bank v. Platt (In Re Platt), 47 B.R. 70 (Bankr. W.D. Wis. 1985).

It is therefore ORDERED that Lisa L. Clarke's debt to AIB in the amount of \$21,139.51 together with future interest from date of judgment as provided by law is not discharged in her Chapter 7 case.⁵

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 19th day of January, 1996.

⁵Having found that the debtor's obligation to AIB is not discharged under §523(a)(2)(A), analysis of §523(a)(2)(B) is unnecessary.